



# ETHICS AND THE GOVERNMENT LAWYER 2010

Developed by Jack Marshall and ProEthics, Ltd.  
For the EEOC EXCEL Conference  
July 12, 2010 ~ Orlando, Florida

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An Interactive Legal Ethics Seminar

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## Your Facilitator Jack Marshall, Esq.

Jack Marshall is the president and founder of ProEthics, Ltd. He has taken the experience gleaned from a diverse career in law, public policy, academia and theater and applied it to the field of legal, business and organizational ethics. He has developed more than 110 programs for bar associations, law firms, Fortune 500 companies, and non-profit organizations, and has worked to develop rules of professional responsibility for attorneys in emerging African democracies through the International Bar Association, and for the new judiciary of the Republic of Mongolia through USAID.

A member of the Massachusetts and DC Bars, Mr. Marshall has been an adjunct professor of legal ethics at the American University School of Law in Washington, DC, and co-authored The Essential Words and Writings of Clarence Darrow with Pulitzer Prize-winning historian Edward Larson, published in 2007 by Random House.

Marshall is a graduate of Harvard College and Georgetown University Law Center. His articles and essays on topics ranging from leadership and ethics to popular culture have appeared in a variety of legal and public policy publications. He has appeared on a variety of talk shows to discuss ethics and public policy, and writes about ethical issues in all areas of business, entertainment, politics and the professions on his web site, [www.ethicsalarms.com](http://www.ethicsalarms.com).

He is also an award-winning stage director, and the artistic director of The American Century Theater, a professional non-profit theater company dedicated to producing classic American plays. He lives in Alexandria, Virginia with his wife and business partner, Grace Marshall, their son Grant, and their Jack Russell Terrier, Rugby. Like many who are interested in the nature of good, evil, justice, and chaos, Marshall is a lifetime fan of the Boston Red Sox.



## I. Warm-Up Exercise: “Taking a Dive”

### The Story...

The Manhattan district attorney, Robert M. Morgenthau assigned 21-year veteran Assistant D.A. Daniel L. Bibb to investigate the murder convictions of two men in the 1990 shooting of a bouncer outside a nightclub. New evidence had called their convictions (and subsequent imprisonment) into question.

Over 21 months, starting in 2003, Bibb and two detectives conducted more than 50 interviews in more than a dozen states, ferreting out witnesses the police had somehow missed or ignored. Finally he reported back: the two imprisoned men were not guilty, and after defense lawyers won court approval for a hearing into the new evidence, Bibb urged that the convictions be set aside. But his boss ordered Bibb to go to the hearing; he knew the case best, after all. He was assigned to present the government’s case and let a judge decide — a strategy that violated his sense of a prosecutor’s duty.

He presented the case, and he lost. Three years later, in a 2008 press interview, Mr. Bibb made a startling admission: he threw the case. Unwilling to do what he was ordered, he said, he deliberately helped the other side win. He tracked

down hard-to-find or reluctant witnesses who pointed to other suspects and prepared them to testify for the defense.

He talked strategy with defense lawyers. And when they veered from his coaching, he cornered them in the hallway and corrected them.

“I did the best I could,” he said. “To lose.... I was being put in a position to defend convictions that I didn’t believe in.” Bibb said he worried that if he did not take the case, another prosecutor would — and possibly win.

Today, the two men, after more than a decade in prison, are free. At the end of the hearing, which stretched over six weeks, his superiors agreed to ask a judge to drop the conviction of one, Olmedo Hidalgo. The judge granted a new trial to the other, David Lemus, who was acquitted in December.

**Q:** Choose one...

1. Bibb should be disbarred.
2. Bibb’s conduct is consistent with the ethical obligations of a prosecutor.
3. In Bibb’s situation, a lawyer should defer to his or her supervisor.
4. Bibb’s proper course was to withdraw or resign.
5. I have another answer

D.C./ABA Professional Rules: 1.1, 1.2, 1.3, 1.4, 1.6, 1.7, 1.13, 2.1, 3.8, 5.1, 5.2, 8.3, 8.4

## The Rules...

### ABA Model Rules of Professional Conduct: *Advocate* Rule 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

...

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

#### Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it \

specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions.

Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

...

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the

court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to

remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

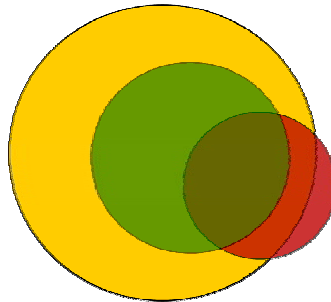
[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

\*\*\*\*\*

**The above provisions (g and h, as well as comments 7, 8 and 9) of ABA Model Rule 3.8 were recently adopted by the ABA, and have not been added to the Rules in D.C. or New York.**

## II. Fending Off Bias, Non-Ethical Considerations, Moral Gray Zones, and Chaos

### A. The Virtuous Attorney's Ethical Systems



#### **YELLOW: The Big Circle:**

- ~ Society, family, peer group, history, experience, literature, religion, education, popular attitudes, role models, opinion leaders
- Basic ethical systems: Reciprocity, Absolutism, Utilitarianism

#### **RED: The Compliance Circle:**

- ~ Laws, regulations, professional codes and rules

#### **GREEN: The Core Circle**

- ~ Conscience; personal ethical boundaries and priorities

### Extra Circles for the Government Lawyer:

- Democratic ideals, values and priorities.
- Specific laws and regulations affecting government employees.
- The Berger Standard:  
*“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.”* Berger, 295 U.S. 78, 88 (1935).

**The Public Lawyer’s Margin:** *How do these fit in the diagram?*

## B. Sources of Chaos: When the Rules Aren’t Enough

### 1. Gödel’s Incompleteness Theorems:

*A. No matter how perfect or complete a system, rule, or principle, there will be non-conforming anomalies at its margins. Stubborn efforts to apply the system, rule or principle to the anomalies will lead to incorrect, absurd or undesirable results.*

*B. Expanding, altering or otherwise forcing the system, rule or principle into a form that includes the anomalies will, if it was valid to begin with, only make it less valid and create more anomalies.*

**Lesson:** *All valid systems, rules and principles, be they mathematical, scientific, philosophical or normative, are inherently incomplete, and one must be prepared to go outside then when an anomaly appears, or be resigned to an unsatisfactory result.*

**The Dilemma:** *Does following Gödel's Theorems inevitably erode faith and reliance on valid systems, rules and principles? If so, is it better to ignore "uncertainty?"*

## 2. Moral Gray Zones: Cultural variances from established rules, policies and even law

## C. The Government Lawyer's Ten Steps to Avoiding Unethical Conduct and Influences

*[Adapted from The Lucifer Effect (Random House, 2007) by Philip Zimbardo]*

1. Think ethics!
2. Accept full responsibility for your actions.
3. Assert and protect your individuality
4. Be vigilant against the power of cognitive dissonance.
5. Recognize the courageous act in support of ethical values, and be willing to do it.
6. Practice humility, modesty, and proportion.
7. Embrace three ethical standards: Government employee, lawyer, and government lawyer.
8. Be alert to deceit, misrepresentations, "spin" and euphemisms.
9. Recognize and reject rationalizations for unethical conduct.
10. Look beyond the moment.

## D. “Brecht’s Truth” and Girding for Pre-Unethical Conditions

**Problem:** When times get tough and people get stressed, ethics is the first casualty.

### Symptoms:

- Haste
- Overwork
- Panic
- Delegated Stress
- Lack of civility
- Inconsiderateness
- Selfishness (“Every man for himself!”)

### Rx:

- Responsibility
- Empathy
- Care
- Fairness
- Humility
- “The Golden Rule”

### III. Recent Legal Ethics Sagas of Note

A. *Oasis West Realty v Goldman*. A lawyer who handled the key parts of his firm's representation of a real estate firm to complete a large development project in the lawyer's community, used his influence in the community after the representation was complete to build opposition to the same project, costing his former client time and money. The firm sued him, charging breach of loyalty and conflict of interest.

Question: Was the lawyer unethical?

B. The Strange Case of Terry Haddock

C. Massachusetts: Pot, the beach, and the blogger.

D. More things to worry about:

- Copy machine confidences
- E-Mail confidentiality

## IV. Hypotheticals

### “Motivations”



The documents were in Phil's desk. He had produced them, too. And now this discovery request in his hand was asking for them.

Phil picked up the phone to dial Grace Meticulos, the DOJ attorney working with him on the case, then put the phone down. The document was bad, front page stuff, embarrassing to the Department and to him personally.

Phil read the request again. Yes... yes... he could legitimately construe the language narrowly enough to exclude the document. Suddenly, Phil got cold feet. He went to his supervisor, Donna DeDedd.

“Yipes!” she said. “Bury that thing!”

“Yeah, well if you read the language of the request...”

Phil began to sputter.

“Right... whatever. Can’t have that surfacing... if it makes you feel better to read the request narrowly, great. Now bury it! And do *not* talk to that nerd at Justice about it... that’s an order!”

Phil went back to his office, trying to focus. Okay, he honestly believed that the document didn’t meet the narrow language of the request. Donna’s reasoning was irrelevant; her decision was still valid. Bury it, she had said.

His stomach was hurting.

## Q: What should Phil do now?

1. He must inform the DOJ attorney of the existence of the document.
2. Phil must produce the document, regardless of Donna’s order.
3. Phil must follow Donna's orders.
4. Donna’s motivations are so suspect that Phil should challenge her instructions even if though he believes the document’s production isn’t required by the discovery request.
5. None of the above.

D.C./ABA Rules 1.2, 1.3, 1.4, 2.1, 3.2, 3.4, 5.1, 5.2, 8.3, 8.4



## “Fun With Experts”””

***I.** The State of Virginia is suing the E.P.A regarding regulations it recently issued regarding carbon pollution. The agency has hired three experts:*

- Dr. Alexis Sixela, president of an atmospheric testing organization the state’s outside law firm represents in other matters.
- Bill Melater, a legislative expert and Idaho lawyer who represented the State of Idaho in environmental litigation while a member of the state’s AG office.
- Michelle Mabell, a member of the same consulting firm one of Idaho’s experts works for.

**Q: Which expert, if any, triggers a conflict of interest?**

1. All of them.
2. Not necessarily any of them.
3. Probably Dr. Sixela and Michelle Mabell.
4. Bill.

***II.*** *An E.E.O.C. attorney arranges to compensate a professor for writing a scholarly journal article supporting the agency's position in upcoming litigation. The expert is explicitly told not to divulge that the article is sponsored by the Department, which will use the article and the prestige of the publication to support its position.*

**Q: Is this a violation of the Rules of Professional Conduct?**

1. Yes.
2. Not if the professor agrees with the position he's supporting in the article.
3. It's sneaky, and I wouldn't do it, but it's not a Rules violation.
4. No.

D.C./ABA Rules 1.2, 1.3, 1.4, 1.6, 1.7, 1.9, 1.10, 1.13, 2.1, 3.3, 8.3, 8.4.

## “Friends”

The deposition of the 18-year-old opposition witness was routine, but one of her answers puzzled Phil, the 50-ish attorney asking the questions. When he asked the young woman about the web sites she visited frequently, she mentioned “Facebook.” Phil didn’t ask any more about

Facebook was unfamiliar to him; after all, he lived in a cave. Back at his office, he asked Perry Legal, his paralegal, about it.

“Facebook? It’s a social networking website,” Perry explained. “Kind of like MySpace, but easier to use. You have your own page, and do daily updates, post photos, chat on line, play games. You know.”

Phil barely understood what his paralegal was saying, but that wasn’t unusual. He decided to do some research on this “Facebook.” He signed up himself, in fact. He searched for the witness and found her page. By now he was excited: there might be information on it that he could use to impeach her on the stand. But there was a catch: before he could explore her page, she had to approve his “friend” invitation, and she would almost certainly recognize his name.

Phil did notice, however, that she had 978 “friends.” “Who has 978 friends?” he thought. “Heck, I have... let’s see... three. 978? She must accept anyone who asks, whether she knows them or not.” Back at the law office, Perry confirmed his assessment.

“Yeah, it’s like a contest for a lot of people,” he said. “I have over a thousand friends myself. I’ll send her a friend request -- my page doesn’t say where I work -- and after she accepts me, I’ll snoop around and pass anything useful to you.”

*“Perfect!”* Phil said.

**Q: Can Phil ethically examine and use what Perry finds on the witness’s Facebook page?**

1. Sure, if she gives Perry access and he hasn’t misrepresented himself.
2. No. This is unethical misrepresentation.
3. Yes, because it was Perry’s plan, and there was nothing unethical about his conduct.
4. No. This is essentially unethical contact with an unrepresented person.
5. I have another answer.

D. C./ABA Rules of Professional Conduct: 1.1, 1.3, 3.4, 4.1, 4.2, 4.3, 4.4, 5.3, 8.4

**REFERENCE: THE PHILADELPHIA BAR ASSOCIATION;  
PROFESSIONAL GUIDANCE COMMITTEE**  
**Opinion 2009-02 (March 2009)**

The inquirer deposed an 18 year old woman (the “witness”). The witness is not a party to the litigation, nor is she represented. Her testimony is helpful to the party adverse to the inquirer’s client.

During the course of the deposition, the witness revealed that she has Facebook” and “MySpace” accounts. Having such accounts permits a user like the witness to create personal “pages” on which he or she posts information on any topic, sometimes including highly personal information. Access to the pages of the user is limited to persons who obtain the user’s permission, which permission is obtained after the user is approached on line by the person seeking access. The user can grant access to his or her page with almost no information about the person seeking access, or can ask for detailed information about the person seeking access before deciding whether to allow access.

The inquirer believes that the pages maintained by the witness may contain information relevant to the matter in which the witness was deposed, and that could be used to impeach the witness’s testimony should she testify at trial. The inquirer did not ask the witness to reveal the contents of her pages, either by permitting access to them on line or otherwise. He has, however, either himself or through agents, visited Facebook and Myspace and attempted to access both accounts. When that was done, it was found that access to the pages can be obtained only by the witness’s permission, as discussed in detail above.

The inquirer states that based on what he saw in trying to access the pages, he has determined that the witness tends to allow access to anyone who asks (although it is not clear how he could know that), and states that he does not know if the witness would allow access to him if he asked her directly to do so.

The inquirer proposes to ask a third person, someone whose name the witness will not recognize, to go to the Facebook and MySpace websites, contact the witness and seek to “friend” her, to obtain access to the information on the pages. The third person would state only truthful information, for example, his or her true name, but would not reveal that he or she is affiliated with the lawyer or the true purpose for which he or she is seeking access, namely, to provide the information posted on the pages to a lawyer for possible use antagonistic to the witness. If the witness allows access, the third person would then provide the information posted on the pages to the inquirer who would evaluate it for possible use in the litigation.

The inquirer asks the Committee’s view as to whether the proposed course of conduct is permissible under the Rules of Professional Conduct, and whether he may use the information obtained from the pages if access is allowed. Several

Pennsylvania Rules of Professional Conduct (the “Rules”) are implicated in this inquiry.

Rule 5.3. **Responsibilities Regarding Nonlawyer Assistants** provides in part that,

*With respect to a nonlawyer employed or retained by or associated with a lawyer:*

*(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:*

*(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; ...*

Since the proposed course of conduct involves a third person, the first issue that must be addressed is the degree to which the lawyer is responsible under the Rules for the conduct of that third person. The fact that the actual interaction with the witness would be undertaken by a third party who, the committee assumes, is not a lawyer does not insulate the inquirer from ethical responsibility for the conduct. The Committee cannot say that the lawyer is literally “ordering” the conduct that would be done by the third person. That might depend on whether the inquirer’s relationship with the third person is such that he might require such conduct. But the inquirer plainly is procuring the conduct, and, if it were undertaken, would be ratifying it with full knowledge of its propriety or lack thereof, as evidenced by the fact that he wisely is seeking guidance from this Committee. Therefore, he is responsible for the conduct under the Rules even if he is not himself engaging in the actual conduct that may violate a rule. (Of course, if the third party is also a lawyer in the inquirer’s firm, then that lawyer’s conduct would itself be subject to the Rules, and the inquirer would also be responsible for the third party’s conduct under Rule 5.1, dealing with Responsibilities of Partners, Managers and Supervisory Lawyers.)

Rule 8.4. **Misconduct** provides in part that,

*It is professional misconduct for a lawyer to:*

*(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; ...*

*(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; ...*

Turning to the ethical substance of the inquiry, the Committee believes that the proposed course of conduct contemplated by the inquirer would violate Rule 8.4(c) because the planned communication by the third party with the witness is deceptive. It omits a highly material fact, namely, that the third party who asks to be allowed access to the witness’s pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit

to impeach the testimony of the witness. The omission would purposefully conceal that fact from the witness for the purpose of inducing the witness to allow access, when she may not do so if she knew the third person was associated with the inquirer and the true purpose of the access was to obtain information for the purpose of impeaching her testimony.

The fact that the inquirer asserts he does not know if the witness would permit access to him if he simply asked in forthright fashion does not remove the deception. The inquirer could test that by simply asking the witness forthrightly for access. That would not be deceptive and would of course be permissible. Plainly, the reason for not doing so is that the inquirer is not sure that she will allow access and wants to adopt an approach that will deal with her possible refusal by deceiving her from the outset. In short, in the Committee's view, the possibility that the deception might not be necessary to obtain access does not excuse it.

The possibility or even the certainty that the witness would permit access to her pages to a person not associated with the inquirer who provided no more identifying information than would be provided by the third person associated with the lawyer does not change the Committee's conclusion. Even if, by allowing virtually all would-be "friends" onto her FaceBook and MySpace pages, the witness is exposing herself to risks like that in this case, excusing the deceit on that basis would be improper.

Deception is deception, regardless of the victim's wariness in her interactions on the internet and susceptibility to being deceived. The fact that access to the pages may readily be obtained by others who either are or are not deceiving the witness, and that the witness is perhaps insufficiently wary of deceit by unknown internet users, does not mean that deception at the direction of the inquirer is ethical.

The inquirer has suggested that his proposed conduct is similar to the common - and ethical - practice of videotaping the public conduct of a plaintiff in a personal injury case to show that he or she is capable of performing physical acts he claims his injury prevents. The Committee disagrees. In the video situation, the videographer simply follows the subject and films him as he presents himself to the public. The videographer does not have to ask to enter a private area to make the video. If he did, then similar issues would be confronted, as for example, if the videographer took a hidden camera and gained access to the inside of a house to make a video by presenting himself as a utility worker.

**Rule 4.1. Truthfulness in Statements to Others** provides in part that,

*In the course of representing a client a lawyer shall not knowingly:*

*(a) make a false statement of material fact or law to a third person; ...*

The Committee believes that in addition to violating Rule 8.4c, the proposed conduct constitutes the making of a false statement of material fact to the witness and therefore violates Rule 4.1 as well.

Furthermore, since the violative conduct would be done through the acts of another third party, this would also be a violation of Rule 8.4a. 1

The Committee is aware that there is controversy regarding the ethical propriety of a lawyer engaging in certain kinds of investigative conduct that might be thought to be deceitful. For example, the New York Lawyers' Association Committee on Professional Ethics, in its Formal Opinion No. 737 (May, 2007), approved the use of deception, but limited such use to investigation of civil right or intellectual property right violations where the lawyer believes a violation is taking place or is imminent, other means are not available to obtain evidence and rights of third parties are not violated.

## “Three Universes”

Under Secretary of Transportation Hedda Cabbage had been up to her ears in the just completed litigation brought by a regional airline association before DOT, challenging a new landing fee scheme for Boston's Logan International Airport that replaced a weight-based fee structure with a structure based on a fixed landing fee regardless of aircraft size, plus an additional weight-based charge. This increased landing fees for smaller aircraft and decreased fees for larger ones. Hedda was instrumental in pushing DOT's ultimate decision that the new landing fee scheme was invalid because the cost allocation method was not scientifically derived. As a result of this landmark airport fees case, the fees paid by operators of small aircraft were reduced.

We now examine the happenings in three parallel universes...

### *In Parallel Universe Alpha:*

Once the decision had been upheld by the District Court, Hedda was contacted by Ofwego, Wilde, Blue, and Yonder, the large D.C. firm representing the association. “That was a big win for our client, Hedda, and we know you were a key player in making it happen. How would you like to come work for us?”

said senior partner Biff Ofwego. The partnership deal was beyond Hedda's wildest dreams. She agreed in a flash....

*In Parallel Universe Beta:*

The law firm contacted Hedda while the matter was pending. "We're awfully impressed with your handling of this matter," the firm's representative, Oscar Wilde, said. "After this is resolved, we'd like to talk to you about coming to work here." Hedda was flattered, and said so. "I think I'd be very interested in what you have to say," she replied, "but it's inappropriate to discuss this now. Contact me after all of this is over." "I'm sure you won't disappoint us," Oscar said, winking. Two weeks after the association got a favorable result, Hedda agreed to come aboard.

*In Parallel Universe Gamma:*

Hedda was surprised to receive a message on her cell phone voice-mail. "This is Burt Sleazy, President of the Regional Airline Owner's Association. Whatever happens in this little dispute we're having, I want you to know that we're grateful for your diligence, wisdom and public spirited dedication to your job, and assuming everything works out, I'm going to strongly suggest to my good friend Biff Ofwego that his firm take you on as a new partner. No need to reply, my dear. Toodles." Sure enough, as soon as the matter was completed, Ofwego contacted Hedda for lunch, and asked her to bring her resume. Thirty days later, she was in a nice corner office at Ofwego, Wilde, Blue, and Yonder.

**Q:** In which parallel universe has Hedda met her ethical obligations?

1. Only Alpha.
2. Alpha and Beta.
3. Alpha and Gamma.
4. All of them.
5. None of them.

D.C./ABA Rules of Professional Conduct: 1.1, 1.2, 1.3, 1.4, 1.7, 1.9, 1.11, 1.16, 3.6, 8.4

### **Rule 1.11—Successive Government and Private Employment**

(a) A lawyer shall not accept other employment in connection with a matter which is the same as, or substantially related to, a matter in which the lawyer participated personally and substantially as a public officer or employee. Such participation includes acting on the merits of a matter in a judicial or other adjudicative capacity.

(b) If a lawyer is required to decline or to withdraw from employment under paragraph (a) on account of a personal and substantial participation in a matter, no partner or associate of that lawyer, or lawyer with an of counsel relationship to that lawyer, may knowingly accept or continue such employment except as provided in paragraphs (c) and (d) below. The disqualification of such other lawyers does not apply if the sole form of participation was as a judicial law clerk.

(c) The prohibition stated in paragraph (b) shall not apply if the personally disqualified lawyer is timely screened from any form of participation in the matter or representation as the case may be, and from sharing in any fees resulting therefrom, and if the requirements of paragraphs (d) and (e) are satisfied.

(d) Except as provided in paragraph (e), when any of counsel, lawyer, partner, or associate of a lawyer personally disqualified under paragraph (a) accepts employment in connection with a matter giving rise to the personal disqualification, the following notifications shall be required:

(1) The personally disqualified lawyer shall submit to the public department or agency by which the lawyer was formerly employed and serve on each other party to any pertinent proceeding a signed document attesting that during the period of disqualification the personally disqualified lawyer will not participate in any manner in the matter or the representation, will not discuss the matter or the representation with any partner, associate, or of counsel lawyer, and will not share in any fees for the matter or the representation.

(2) At least one affiliated lawyer shall submit to the same department or agency and serve on the same parties a signed document attesting that all affiliated lawyers are aware of the requirement that the personally disqualified lawyer be screened from participating in or discussing the matter or the representation and describing the procedures being taken to screen the personally disqualified lawyer.

(e) If a client requests in writing that the fact and subject matter of a representation subject to paragraph (d) not be disclosed by submitting the signed statements referred to in paragraph (d), such statements shall be prepared concurrently with undertaking the representation and filed with Bar Counsel under seal. If at any time thereafter the fact and subject matter of the representation are disclosed to the public or become a part of the public record, the signed statements previously prepared shall be promptly submitted as required by paragraph (d).

(f) Signed documents filed pursuant to paragraph (d) shall be available to the public, except to the extent that a lawyer submitting

a signed document demonstrates to the satisfaction of the public department or agency upon which such documents are served that public disclosure is inconsistent with Rule 1.6 or other applicable law.

(g) This rule applies to any matter involving a specific party or parties.

(h) A lawyer who participates in a program of temporary service to the Office of the District of Columbia Attorney General of the kind described in Rule 1.10(e) shall be treated as having served as a public officer or employee for purposes of paragraph (a), and the provisions of paragraphs (b)-(e) shall apply to the lawyer and to lawyers affiliated with the lawyer.

## “Choices”

**A.** You are an attorney for a government agency. Administration officials want to pursue a policy -- pick one -- that is politically sensitive and raises substantial legal issues. You believe it is an arguably legal option, but strong policy arguments can be made against it, policy arguments that you share, and strongly. You are directed to assist other agency attorneys in developing the necessary legal framework for the policy.

*What do you choose to do?*

**B.** The Attorney General has statutory authority over litigation in which several agencies have divergent interests. The Department of Justice, for example, represents the Environmental Protection Agency, your employers in the action, but the responsibilities of the Departments of Energy and Transportation are affected and they have taken positions contrary to that of EPA, Lawyers in the Environmental Division. Your superior orders you to withhold certain information from Justice, Energy and DOT, as part of a strategy to advance the EPA's position.

*What do you choose to do?*

C. You are a prosecutor, and you want to offer a plea agreement to defense counsel on the condition that she agrees to not disclose--*even to the defendant*--the identity of the government's confidential informant, the key witness in the case. The prosecutor wishes to protect this witness by restricting knowledge of the witness' identity and involvement. The proposed agreement will require that the defense counsel must not disclose to her client the identity of the witness or the witness' involvement in the case. If disclosure is made to the defendant for any reason, the plea offer will be withdrawn. But you feel unsettled about the ethical propriety of your plan.

*What do you choose to do?*

D.C./ABA Rules of Professional Conduct:  
1.2, 1.3, 1.4, 1.6, 1.7, 1.13, 1.16, 1.18, 2.1, 3.4, 3.8, 8.4

## IV. Concluding Remarks and Discussion

# Supplementary Material

## U.S. Department of Justice Office of Professional Responsibility

*(This document is intended to provide guidance concerning OPR's analytical framework. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, relating to OPR's investigations, its findings and conclusions, or any action taken as a result of them. This document places no limitation on OPR's exercise of its authority and jurisdiction as determined by federal regulation and Attorney General order.)*

### Analytical Framework

#### A. Introduction

In general, after investigating an allegation of misconduct made against a Department of Justice attorney, OPR determines, based on all the facts found, whether the attorney committed professional misconduct in the exercise of his or her authority to investigate, litigate or provide legal advice. If OPR concludes that an attorney did not commit professional misconduct, OPR determines whether the attorney exercised poor judgment, engaged in other inappropriate conduct, made a mistake, or acted appropriately under all the circumstances.

In making these determinations in the majority of cases, OPR is guided by a general analytical framework described here.<sup>1</sup> Other modes of analysis may be used in investigations of allegations of misconduct by law enforcement personnel that are related to allegations of misconduct by Department attorneys, or in investigations of matters not otherwise within OPR's general

jurisdiction that are assigned to this Office by the Attorney General or Deputy Attorney General. Additionally, because allegations of professional misconduct are inherently fact-specific and varied in nature, it is impossible to foresee every possible type of allegation of professional misconduct that may be made against a Department attorney. Thus, alternative modes of analysis may be required in particular cases.

## **B. Professional Misconduct**

### **1. Definition**

A Department attorney engages in professional misconduct when he or she intentionally violates or acts in reckless disregard of an obligation or standard imposed by law, applicable rule of professional conduct, or Department regulation or policy. The elements essential to a conclusion that an attorney committed professional misconduct, then, are that the attorney (1) violated or disregarded an applicable obligation or standard (2) with the requisite scienter. A violation or disregard of an obligation or standard does not necessarily constitute professional misconduct if, under the circumstances, it is *de minimis*.

### **2. Obligation or Standard**

Department attorneys are subject in the performance of their professional duties to obligations and standards imposed by law, by applicable rules of professional conduct, and by Department regulations and policies, the violation or disregard of which could implicate an attorney's professionalism. There are many sources of such obligations and standards, including the Constitution (e.g. the protections afforded by the Fourth, Fifth and Sixth Amendments that a prosecutor must respect), federal statutes (e.g. Jencks Act disclosure requirements), case law (e.g. court opinions interpreting the Due Process Clause as prohibiting vindictive prosecution), court orders (e.g. a District Court's order on a motion in limine), rules of procedure (e.g. requirements in the Federal Rules of Civil Procedure and a District Court's rules governing civil discovery), standards of conduct imposed by an attorney's licensing authority or by the jurisdiction in which the attorney is litigating (e.g. state rules of professional conduct mandating candor to a tribunal), regulations issued by the Department and codified in the Code of Federal Regulations (e.g. the regulation concerning subpoenas to members of the news media), regulations codified in the Code of Federal Regulations and applicable to Department employees as well as other Executive Branch employees (e.g. the prohibition on the use of an employee's public office for private gain), and Department policies contained in the United States Attorney's Manual (e.g. the requirements imposed on prosecutors by the Principles of Federal Prosecution, which are published in the Manual).

In a given situation, then, a Department attorney's conduct may be governed by a number of obligations and standards from a variety of sources. It is the

attorney's professional duty to attempt in good faith to ascertain the obligations and standards imposed on him or her and to comply with them. An attorney who fails to do so and who violates or disregards an obligation or standard, with scienter, commits professional misconduct.

### **3. Intent**

An attorney intentionally violates an obligation or standard when he or she (1) engages in conduct with the purpose of obtaining a result that the obligation or standard unambiguously prohibits, or (2) engages in conduct knowing its natural or probable consequence and that consequence is a result that the obligation or standard unambiguously prohibits. Intentional professional misconduct, then, includes both conduct that is purposeful and conduct that is knowing. The attorney's conduct includes the actions the attorney takes and fails to take.

Although an attorney may deny intent, either by denying an improper purpose or by denying knowledge of the natural or probable consequences of his or her conduct, OPR's finding whether the conduct was intentional is made using the same preponderance of the evidence standard OPR uses in making other factual findings. Evidence of intent can include, but is not limited to, the circumstances surrounding the attorney's conduct, statements the attorney made, and other, related conduct in which the attorney engaged. When an attorney denies intent, OPR evaluates and notes in its report, in appropriate circumstances, the attorney's credibility in making the denial, and explains in the report why the attorney was found credible or not in the denial.

### **4. Reckless Disregard**

An attorney acts in reckless disregard of an obligation or standard when (1) the attorney knows, or should know based on his or her experience and the unambiguous nature of the obligation or standard, of an obligation or standard, (2) the attorney knows, or should know based on his or her experience and the unambiguous applicability of the obligation or standard, that the attorney's conduct involves a substantial likelihood that he or she will violate or cause a violation of the obligation or standard, and (3) the attorney nonetheless engages in the conduct, which is objectively unreasonable under all the circumstances. Thus, an attorney's disregard of an obligation or standard is reckless when, considering the nature and purpose of the attorney's conduct and the facts known to the attorney, it represents a gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation.

An attorney who makes a good faith attempt to ascertain the obligations and standards imposed on the attorney and to comply with them in a given situation does not commit professional misconduct. Evidence that an attorney made a good faith attempt to ascertain and comply with the obligations and standards

imposed can include, but is not limited to, the fact that the attorney reviewed materials that define or discuss one or more potentially applicable obligations and standards, consulted with a supervisor or ethics advisor, notified the tribunal or the attorney representing a party or person with adverse interests of an intended course of conduct, or took affirmative steps the attorney reasonably believed were required to comply with an obligation or standard.

### **C. Conclusions Other Than Professional Misconduct**

If OPR concludes that an attorney did not commit professional misconduct, OPR determines whether the attorney exercised poor judgment, engaged in other inappropriate conduct, made a mistake, or acted appropriately under all the circumstances. If OPR determines that an attorney's conduct was inappropriate, it articulates in its report why the attorney's conduct did not rise to the level of professional misconduct.

The Department has a justifiable expectation that its attorneys will use good judgment in carrying out their professional duties and in exercising the broad discretion the Department has provided them to do so. An attorney exercises poor judgment when, faced with alternative courses of action, he or she chooses a course of action that is in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take. Poor judgment differs from professional misconduct in that an attorney may act inappropriately and thus exhibit poor judgment even though he or she may not have violated or acted in reckless disregard of a clear obligation or standard.

In addition, an attorney may exhibit poor judgment even though an obligation or standard at issue is not sufficiently clear and unambiguous to support a professional misconduct finding. For example, an attorney exercises poor judgment when, confronted with an obviously problematic set of circumstances, the attorney fails to seek advice or guidance from his or her supervisors even though an attorney exercising good judgment would do so.

When OPR concludes that an attorney demonstrated poor judgment in a matter it has investigated, it refers this conclusion to the responsible management official for consideration. A referral is a notification by OPR that management should consider and take appropriate steps to follow up on a report's conclusion about a particular attorney. After OPR makes a referral, management officials advise OPR of what steps they take to follow up on the report's conclusion. A referral is not made if an attorney engaged in inappropriate conduct not amounting to professional misconduct or poor judgment or simply made a mistake.

A mistake results from excusable human error despite an attorney's exercise of reasonable care under the circumstances. Whether an attorney's error is

excusable depends upon factors including: the attorney's opportunity to plan, and to reflect upon the possible and foreseeable consequences of, a course of conduct; the breadth and magnitude of the responsibilities borne by the attorney; the importance of the conduct in light of the attorney's overall responsibilities and actions; and the extent to which the error is representative of the attorney's usual conduct.

Examples of mistakes OPR has noted in prior reports include poor choice of words in unplanned remarks, misunderstanding the facts despite a reasonable attempt to inform oneself, and misunderstanding the law despite a reasonable attempt to research, interpret and apply it. Mistake differs from poor judgment in that an attorney makes a mistake as a result of excusable human error despite choosing an appropriate course of action.

When OPR does not conclude an attorney committed professional misconduct, demonstrated poor judgment, or made a mistake, OPR's report specifies whether or not the attorney's conduct was found to be appropriate under all the circumstances. Although a referral is not made, clarifying whether an attorney's conduct was appropriate in a matter identifies potential problems for management and helps to uphold the standards of appropriate conduct all Department attorneys should strive to meet.

Potential problems OPR has noted in prior reports as inappropriate conduct that did not, under the circumstances of those particular cases, rise to the level of professional misconduct, demonstrate poor judgment or constitute a mistake include poor communication between attorneys, mismanagement of witnesses and poor organization of files. In its report on an investigation, OPR can identify for review and consideration by Department officials any issues relating to Department policies, practices and procedures or to possible management deficiencies raised in the investigation. OPR can also identify for review and consideration by an office's managers possible systemic problems found in the office during OPR's investigation.

